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November 4, 1994

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

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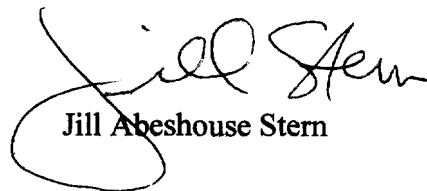
Re: CC Docket No. 92-166

Dear Mr. Caton:

On behalf of Mobile Communications Holdings, Inc., I am transmitting herewith an original and five copies of its Request for Stay in the above-referenced proceeding.

Should there be any questions concerning this matter, kindly communicate with the undersigned.

Sincerely,


Jill Abeshouse Stern

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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NOV 4 1994

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

In the Matter of

Amendment to the Commission's Rules to
Establish Rules and Policies Pertaining
to a Mobile Satellite Service in the
1610-1626.5/2483.5-2500 MHz
Frequency Bands

)
)
) CC Docket No. 92-166
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EMERGENCY PETITION FOR STAY

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ATTORNEY FOR MOBILE COMMUNICA-
TIONS HOLDINGS, INC.

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EMERGENCY PETITION FOR STAY

Mobile Communications Holdings, Inc. ("MCHI"), by its attorneys and pursuant to Section 405(a) of the Communications Act of 1934, as amended, and Commission Rule 1.43, respectfully requests an emergency stay of that portion of the Commission's Report and Order in CC Docket No. 92-166, 47 CFR Parts 25 and 94, Licensing Policies and Procedures, Satellite Communications, 59 Fed. Reg. 53,294 (Oct. 21, 1994) ("Report and Order") which requires applicants in the Above 1 GHz Mobile Satellite Service ("MSS") to submit updated legal and financial qualifications (including ownership structure) on November 16, 1994. The Report and Order adopted rules governing the licensing and regulation of low-Earth-orbit ("LEO") mobile satellite systems operating in the 1610-1626.5/2483.5-2500 MHz frequency bands (the "Above 1 GHz MSS" or "Big LEO" satellite service.)

As detailed herein, American Mobile Satellite Corporation ("AMSC") has announced that it will modify its pending application on November 16, 1994 to

specify a Big LEO system. The unexpected inclusion of a sixth applicant in this proceeding creates mutual exclusivity and ensures that an auction plan will be implemented. The Commission's failure to establish auction rules that disseminate licenses among a wide variety of applicants, including small businesses, contrary to the statutory mandate of Section 309(j) of the Communications Act, will cause irreparable harm to MCHI if this stay is not granted pending court review of the Report and Order.

In light of the irreparable harm that MCHI will suffer, the urgent need for action before the November 16, 1994 amendment date, and the late-breaking nature of AMSC's revelation that it intends to submit a Big LEO application, MCHI requests that the Commission act on this petition no later than 3:00 p.m. on November 8, 1994. If the Commission has not acted on this Emergency Petition for Stay or if the Commission has denied this Emergency Petition for Stay, by three o'clock p.m. November 8, 1994, MCHI will submit an Emergency Motion For Stay Pending Review in the United States Court of Appeals for the District of Columbia Circuit on that date.¹⁴

¹⁴ Court rules require submission of the court motion seven days before November 16, 1994.

SUMMARY

There are compelling grounds for grant of a stay in the present case. MCHI demonstrates herein that it will suffer irreparable harm if the Commission proceeds with the scheduled November 16, 1994 application amendment date established by the Report and Order without first clarifying the auction procedures that will apply for selecting among mutually exclusive applications in this service.²⁴ American Mobile Satellite Corporation has stated that it will modify its pending application to specify a Big LEO system. As a result, the auction plan will be implemented. The Report and Order states that only five systems can be accommodated in the available frequency bands.

Although the Report and Order establishes an auction framework, the Commission failed to consider critical issues relating to the conduct of an auction. Most importantly, the Commission abdicated its statutory duty, pursuant to Section 309(j) of the Communications Act of 1934, as amended, to consider auction design measures to enhance the capability of small businesses to participate in providing spectrum-based services. Contrary to this statutory mandate, the Commission erroneously concluded that small business consideration was unnecessary because no applicant qualifies as a small business.

²⁴ In addition to MCHI's application, applications have been filed by the American Mobile Satellite Corporation ("AMSC"), Motorola Satellite Communications, Inc. ("Motorola"), TRW Inc. ("TRW"), Loral/Qualcomm Partnership L.P. ("Loral") and Constellation Communications Corporation ("Constellation").

To the contrary, MCHI meets the definition of "entrepreneur" or "small business" that has been employed in recent Commission auction proceedings relating to personal communication services and other innovative technologies where the Commission has employed a range of tools including spectrum set-asides, installment payments and discounts to foster small business participation. In order to meet the Commission's November 16, 1994 filing date and the financial qualification standards imposed in the Report and Order, MCHI is faced with the untenable prospect of making irreversible structural changes and/or commitments which have no necessary relationship to what will be required by the financial community to fund the construction and operation of this system. These irreversible changes could conceivably deny the applicant from claiming benefits of a small business.^{3/}

This result is clearly contrary to the Congressional intent underlying Section 309(j) of the Communications Act which reflects strong concern that opportunities be preserved for small businesses to participate in providing spectrum-based services. Fostering small business is an important national policy objective that has also been articulated by successive presidential administrations.

^{3/} As discussed below, the Commission adopted a "strict" financial standard requiring companies to submit a balance sheet showing sufficient current assets to construct, launch and operate the system for one year. The system costs for the proposed systems are as high, in some cases, as \$3 billion. If the applicant lacks sufficient cash on hand, "irrevocable" debt or equity commitments must be supplied. MCHI and its financial advisors, Barclays Bank, repeatedly pointed out in Commission proceedings below that this standard favors established companies (usually large) with other lines of business and does not comport with the financial realities of financing global satellite systems.

Not only will MCHI suffer irreparable harm unless a stay is granted, but, in light of the clear statutory mandate of Section 309(j) of the Communications Act, MCHI is likely to prevail on the merits. Under well-established precedent, the Commission's failure to consider relevant factors, including MCHI's small business qualifications, its erroneous conclusion that no applicant qualifies as a small business, and its disregard of its statutory duties under Section 309(j) are arbitrary and capricious actions requiring reversal of the Report and Order.

Moreover, a stay will preserve the status quo while the Commission has an opportunity to proceed in an orderly fashion and adopt appropriate auction rules that are consistent with statutory imperatives. None of the applicants will be harmed in the meantime. The partial stay proposed herein will allow technical amendments to proceed as scheduled on November 16, 1994. Construction of the satellite systems can proceed under Section 319(d) waivers, which have been received by three applicants and sought by a fourth, pending grant of final authorizations. In addition, four of the six applicants have supported a deferred financial showing, in a joint September 9, 1994 filing with the Commission (see Appendix A), providing further evidence that a brief suspension of the amendment date for legal and financial qualifications will not harm the other applicants.

STATEMENT OF FACTS

In November 1990, MCHI was the first company to file an application with the Commission for a mobile satellite system in the 1610-1626.5 and

2483.5-2500 MHz bands (the "L" and "S" bands respectively) using a constellation of small, low-Earth orbiting satellites to provide a variety of innovative communication services.^{4/} Subsequently, applications were filed by five other parties seeking concurrent consideration with MCHI's satellite system known as ELLIPSO™. All of these applicants, with the exception of AMSC, have proposed LEO satellite systems.

Although a start-up company, MCHI has been able, in the time-honored American tradition, to attract a team of strategic partners that are assisting in system development. Fundamental to the ELLIPSO™ approach, in 1990 and today, is the concept of progressive or staged deployment to meet demand. A unique feature of the ELLIPSO™ system is its ability to introduce a commercially viable service in stages without having to launch its entire constellation of satellites by virtue of an elliptical orbit architecture. This approach has been favorably received by the financial community, including Barclays Bank which serves as ELLIPSO™'s financial advisor and ELLIPSO™'s strategic partners. Representative of this support is a letter Barclays submitted in the Big LEO rulemaking (CC Docket No. 92-166) in which it stated that "Ellipsat's business plan and system design offers unique advantages [and] significantly improves the timing of the financial exposure of corporate sponsors and financial investors."^{5/}

^{4/} This application was filed by Ellipsat Corporation, a subsidiary of MCHI. As a result of a corporate restructuring in August 1994, Mchi is currently the applicant.

^{5/} Letter from Trevor Nash, Director Barclays de Zoete Wedd Ltd. to William A. Caton, dated May 3, 1994.

Over the course of four years, MCHI and its predecessor, Ellipsat Corporation, participated actively in various rulemaking proceedings relating to spectrum allocations and licensing rules for the Big LEO satellite service, including an extensive negotiated rulemaking proceeding. A central issue in the proceedings was the best means of accommodating multiple satellite systems, using different technologies, in the limited frequency spectrum available for the service.

In its comments in CC Docket No. 92-166, MCHI urged, among other things, that, should the Commission hold an auction to resolve mutual exclusivity, spectrum should be set-aside for small businesses.⁶⁴ MCHI also recommended that the Commission adopt financial standards that accommodate different market approaches and strategies, and provide flexibility for introduction of this new, commercially unproven service consistent with precedent in other the satellite proceedings. Without this flexibility, MCHI expressed concern that the Commission would impose an inequitable double standard on newly-formed companies (often small businesses) in contrast to companies with other lines of business (often large companies) with substantial balance sheets.⁷¹

In response to Commission urging, the Big LEO applicants met repeatedly over a protracted period in 1994 to negotiate a compromise plan for sharing the allocated frequency bands. On September 9, 1994, four of the Big LEO applicants, including MCHI, filed a Joint Proposal and Settlement Agreement with

⁶⁴ See Comments of Ellipsat Corporation, filed May 5, 1994, at 14-15.

⁷¹ See, e.g., Reply Comments of Ellipsat Corporation, filed June 20, 1994, at 30.

the Commission which reflected agreement on a range of issues including spectrum sharing and financial standards.^{8/}

On October 14, 1994, the Commission adopted its final rules in the Big LEO proceeding (CC Docket No. 92-166). Report and Order, 59 Fed. Reg. 53,294 (1994). Entities with pending applications were given until November 16, 1994 to file amended applications conforming to the newly adopted rules. Id. at 53,294.^{9/} Such applications must include a statement of the applicant's legal qualifications, including ownership structure. 47 C.F.R. § 25.114(c)(19) (1993). The Commission elected to impose a strict financial qualification standard for the entire satellite constellation. Id., 59 Fed. Reg. at 53,297-300. Under this standard, applicants must, by November 16, 1994, demonstrate current assets and operating income sufficient to meet the estimated system costs (without any guarantee that the funds will so be used) or, alternatively, irrevocable debt and equity commitments to fund the project.

^{8/} In the Joint Proposal, four of the parties endorsed a financial standard based upon demonstration of financing for 25% of the satellite construction, launch and operation costs. See Appendix C hereto. Contrary to the overwhelming support for a relaxed financial standard, this proposal was rejected by the Commission in the Report and Order. Even more surprisingly, the sole rationale cited by the Commission in its Report and Order for the adoption of stringent financial qualification standards was an ex parte submission by Loral/Qualcomm Partnership consisting of a two-page letter from the Chairman of Loral Corporation to the Chairman of Motorola which contained a one-sentence reference to financial standards. See Report and Order at 53,298, n.42.

^{9/} This 30-day amendment period is significantly shorter than the amendment periods provided in other satellite proceedings. For example, in the non-voice, non-geostationary mobile satellite service, applicants were provided with 90 days from Federal Register publication of the Commission's decision to submit conforming amendments. See Report and Order, CC Docket No. 92-76, 8 FCC Rcd 8450, 8458 (1993).

Although the Commission permits an applicant to delay its financial showing until January 1996 without losing its place in the initial processing group, it warns that any applicant does so at its own risk that insufficient spectrum will be available in January 1996 to accommodate the system. Id. at 53,300. As a result, applicants have no practical choice but to seek to qualify on the November 16, 1994 amendment date.

In the Report and Order, the Commission indicated its intention to use an auction in the event that the sharing plan does not resolve mutual exclusivity. In this regard, the Commission stated that the allocated frequencies "cannot in themselves accommodate all proposed CDMA systems, including AMSC's."^{10/} Although citing Section 309(j) of the Communications Act of 1934, as amended, which mandates that the FCC consider auction design features favoring small business, the Commission summarily concluded that no such consideration was warranted. The Commission found erroneously that "none of the applicants qualifies as small, minority-owned or women-owned." Report and Order, 59 Fed. Reg. at 53,306. In the Commission's view, a new filing window would therefore have to be opened to promote small business ownership and this step would be infeasible under the circumstances.

RELIEF REQUESTED

MCHI asks the Commission to stay, pending judicial review, that portion of the Report and Order directing the applicants to amend their applications on November 16, 1994 to conform to the newly adopted rules relating to legal

^{10/} 59 Fed. Reg. 53305.

and financial qualifications. This limited stay will serve the public interest by requiring the Commission to execute its statutory mandate to consider an auction design including small business enhancements while permitting the Commission's staff to evaluate the technical merits of the applicants' proposals without delay.

ARGUMENT

A stay pending judicial review is appropriate if (1) petitioner is likely to prevail on the merits; (2) the petitioner will suffer irreparable harm if the stay is not granted; (3) other interested parties would suffer little, if any, harm if the stay were granted; and (4) a stay is in the public interest. Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). MCHI need not show a mathematical likelihood (greater than 50%) of success on the merits, provided it has made a substantial case on the merits and the other three factors strongly favor staying the order. Washington Metropolitan Area Transit Authority v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). Under these standards, a stay is fully warranted in this case.

I. MCHI is Likely to Prevail on the Merits

MCHI is likely to prevail on the merits. The Commission's failure to consider small business in establishing its auction design patently violates Section 309(j) of the Communications Act of 1934, as amended. In addition, under well-established precedent, the Commission's failure to consider relevant facts and its reliance on erroneous factual assumptions are arbitrary

and capricious actions requiring reversal of the Report and Order.^{11/}

- A. The Commission violated the Communications Act of 1934, as amended, by failing to ensure opportunities for small business in adopting auction procedures.

The Report and Order violates Section 309(j) of the Communications Act of 1934, as amended, by failing even to consider measures to enhance the capability of small businesses to participate in providing this new mobile satellite service. Section 309(j)(3) of the Communications Act of 1934 states in relevant part:

. . . In identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection, the Commission . . . shall seek to promote . . . the following objectives: . . .

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women[.]

Communications Act of 1934 § 309(j)(3), 47 U.S.C.A. § 309(j)(3) (West Supp. 1994) (emphasis added). The statutory language of the verb "shall" unequivocally directs the Commission to "promote economic opportunity and competition" by issuing licenses to a wide variety of applicants, including small

^{11/} Serious questions are also raised as to the legality of the financial standard under decisions of the appeals court. See, e.g., ARINC v. FCC, 928 2d 428 (D.C. Cir. 1991). In that decision, the court held that financial criteria cannot be used to winnow the applicant field or to "eradicate nonconformity under the pretext of assessing financial qualifications." Id. at 448.

businesses.^{12/} The statute permits the Commission to use installment payments rather than lump sum payments, and to bundle frequencies, service areas, and bandwidth specifically to promote the participation of small businesses. Id. §§ 309(j)(4)(A)(c). The statute further directs the Commission to consider the use of tax certificates, bidding preferences, and other procedures to enhance the opportunity for small businesses to participate in the provision of spectrum-based services. Id. § 309(j)(4)(D).

The committee reports accompanying enactment of Section 309(j) emphasize the concern that auctions could favor large companies.

One of the primary criticisms of utilizing competitive bidding to issue licenses is that the process could inadvertently have the effect of favoring only those with "deep pockets", and therefore have the where-withal to participate in the bidding process. This would have the effect of favoring incumbents, with established revenue streams, over new companies or start-ups. The Committee has given the Commission the flexibility to design alternative payment schedules in order that this not occur.

H.R. Rep. No. 111, 103d Cong., 1st Sess. at 255, reprinted in 1993

U.S.C.C.A.N. at 582 (emphasis added). Both the plain language of Section 309(j) and its legislative history indicate that if the Commission decides to use an auction to allocate spectrum, it has an unequivocal duty to consider auction design measures benefiting small businesses.

^{12/} See also H.R. Rep. No. 111, 103d Cong., 1st Sess. 254, reprinted in 1993 U.S.C.C.A.N. 378, 581 (emphasis added); see also H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 482, reprinted in 1993 U.S.C.C.A.N. 1088, 1171 (emphasis added) ("The amendment requires that the Commission disseminate licenses among a wide variety of applicants, including small businesses. . . .").

In establishing the basic framework for spectrum auctions in the Commission's competitive bidding proceedings, the agency has clearly recognized its duty to ensure that small businesses are afforded the opportunity to participate in providing spectrum-based services. See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Second Report and Order, 9 F.C.C. Rcd. 2348 (1994) ("Second Report and Order"). The Second Report and Order contains a detailed discussion of the treatment of small businesses in spectrum auctions and acknowledges the Commission's statutory mandate to ensure meaningful participation by small businesses. Id. at 2388-2400.

In the Second Report and Order, the Commission recognized, as did the Congress, that the primary barrier to successful small business participation in spectrum auctions would be the amount of capital required to commence successful operations. See id. at 2389-90, 2396. The Commission adopted a default definition of "small business" limiting that designation to "an entity that, together with its affiliates, has no more than \$6 million net worth, and, after federal income taxes (excluding any carry over losses), has no more than \$2 million in annual profits each year for the previous two years." Id. at 2395-96, 2410 (to be codified at 47 C.F.R. § 1.2110(b)(1)). However, the Commission also wisely recognized that certain services are capital intensive, and therefore reserved the flexibility that "the threshold can be adjusted on a service-by-service basis to accommodate such situations." Id. at 2396.

The Second Report and Order provided a large selection of tools to promote participation by small business, including installment payments and reduced post-auction down payments, bidding credits, and spectrum set-asides. Id. at 2389-92. The Commission indicated that it would decide whether and how to use these preferences, or others, when it developed specific competitive bidding rules in particular services. Id. at 2389.

In every subsequent order considering auction design except this proceeding, the Commission has invariably acknowledged its statutory duty, closely considered the appropriateness of its general definition of small business, and carefully crafted its auction design to incorporate appropriate small business preferences. ^{13/}

In the Broadband PCS Service, which, because of its capital-intensive entry barriers is strikingly similar to the Big LEO Service,^{14/} the Commission utilized a variety of tools to promote small business and entrepreneurship. First, the Commission altered its default definition of "small business," providing for an upper limit of \$40 million net revenue for small business. However, the Commission set aside spectrum for entrepreneurs (including small businesses) whose affiliates and investors do not cumulatively exceed gross

^{13/} See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Third Report and Order, 9 F.C.C. Rcd. 2941, 2978-79 (1994) ("Third Report and Order"); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Fourth Report and Order, 9 F.C.C. Rcd. 2330, 2340 (1994) ("Fourth Report and Order").

^{14/} The Commission estimates LEO systems will cost between \$97 million and \$2 billion to implement. Report and Order, 59 Fed. Reg. at 53,294.

revenues of \$125 million and assets of \$500 million. Small businesses and entrepreneurs were thus permitted to enter into bidding consortia or strategic partnerships with large businesses without losing their small business status. See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Fifth Report and Order, slip op. at 75-79 (PP Docket No. 93-253 July 15, 1994) ("Fifth Report and Order"). Second, the Commission provided a spectrum set-aside, bidding credits, installment payments, and reduced up-front and total down payments to foster small business/entrepreneurship. See id. at 53-63.

Contrary to the statutory mandate and in an unexplained departure from its own decisions, in the Big LEO Service the Commission has utterly failed to ensure participation by small businesses and entrepreneurs. Unlike all of its previous auction decisions, the Commission did not carefully consider capital entry requirements, establish an appropriate definition for "small business," or craft appropriate small business preferences. The Commission's failure even to consider such appropriate actions is clearly contrary to the unambiguous language of Section 309(j) of the Communications Act and an unexplained departure from the Commission's prior decisions in the competitive bidding docket.

The Commission should have established a definition for small business and entrepreneurs in this proceeding (as it did for Broadband PCS), and then examined individual applications to see whether the applicant met the definition. Instead, the Commission callously ignored its statutory mandate and

merely assumes no applicants will meet the small business definition. For this reason, MCHI is likely to prevail on the merits, resulting in this Court vacating and remanding the Report and Order for further proceedings to adopt appropriate auction criteria.

B. The Report and Order relies upon erroneous factual assumptions.

The Commission erroneously concluded that "[n]o one disputes TRW's assertion that none of the applicants qualifies as small, minority-owned or women-owned." Report and Order, 59 Fed. Reg. at 53,306. This erroneous conclusion formed the sole basis for the Commission's decision not to provide a spectrum set-aside or other mechanism to promote participation by small businesses if an auction should be held. This error provides additional grounds for reversal and remand of the Commission's decision.

Mobile Communications Holdings, Inc. and its predecessor in interest, Ellipsat Corporation, have made repeated assertions in the administrative record of this proceeding that each qualifies as a small, entrepreneurial business. In its reply comments in the Big LEO proceeding, MCHI urged the Commission, if it should adopt auction procedures, to set aside spectrum for small business.^{15/} In addition, MCHI met repeatedly with the FCC staff during the month of September, 1994 to discuss the disproportionate impact of the proposed Big LEO rules on small businesses. See Ex Parte Notices dated September 22, 1994 (Appendix B hereto). A letter was submitted on MCHI's behalf

^{15/} See Comments of Ellipsat Corporation in CC Docket No. 92-166, at 14-15 (May 5, 1994). Relevant portions are attached as Appendix D.

by U.S. Representative John Mica, citing the "continuing interest of Congress... in assuring that small business is not disadvantaged in spectrum allocation and is allowed a fair chance to compete." See Appendix C hereto. There was thus abundant evidence in the record both as to the importance of ensuring small business opportunities in this proceeding and MCHI's qualifying status.

In this proceeding, the Commission by its own admission undertook no review to determine whether one or more of the applicants might qualify as a small business (even under its default small business definition), merely accepting without investigation the self-serving assertion of a large-business applicant that no applicants would qualify as a small business. The Commission's Report and Order is thus based on an erroneous factual assumption, namely that the current processing group does not include any small business. Under well-established precedent, this reliance on an erroneous factual assumption requires the Commission's Order to be vacated as arbitrary and capricious. See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). See also Action for Children's Television v. FCC, 852 F.2d 1332, 1340-44 (D.C. Cir. 1991); Aeronautical Radio, Inc. v. FCC, *supra* at 447.

II. MCHI will Suffer Irreparable Harm if a Stay is not Granted

MCHI will suffer irreparable harm if a stay is not granted. The imposition of a strict financial standard combined with the absence of auction provisions relating to small business treatment creates the present dilemma.

In the Report and Order, the Commission elected to apply a strict standard for financial qualifications. Report and Order, 59 Fed. Reg. at 53,298. In order to meet this standard, an applicant must demonstrate financial ability to meet construction, launch, and first-year operating expenses for the entire system on November 16, 1994. This standard can be met in only two ways. First, the applicant may provide a balance sheet showing sufficient current assets and operating income to meet the estimated costs. 47 C.F.R. §§ 25.140(c), (d)(1). Second, the applicant may provide evidence of a fully-negotiated, "irrevocable" commitment for equity or debt funding of the entire system. Id. § 24.140(d)(2)(i) and (ii).

This financial standard is wholly incompatible with the definition of small business and entrepreneur that have been adopted in previous auction proceedings. In the Report and Order, the Commission established a November 16, 1994 deadline for submission of amended applications, Report and Order, 59 Fed. Reg. at 53,294, but, as discussed above, failed to indicate what definition it would apply to determine small business status. Because 47 C.F.R. § 25.114(c)(19) requires the applicant to disclose its organizational structure on FCC Form 430 on the November 16 deadline, MCHI must make critical and irreversible decisions regarding its near and long-term commitments without being able to determine what effect, if any, those decisions might have on its small business status in the event an auction is necessary.

In other auction proceedings, the Commission has clearly defined the types of business arrangements that are permitted without affecting the

applicant's small business status. The Broadband PCS proceeding, for example, provided substantial flexibility to structure an applicant so as to qualify for small business/entrepreneur treatment while stimulating financial investment from larger companies. In that case, the gross revenues, total assets and net worth of investors are not considered so long as the applicant has a control group with 50.1 percent of the voting stock that meets the qualification standard.

There is no such guidance here. A high likelihood exists that, in order to demonstrate financial qualifications, MCHI will be required to enter into "affiliations" with large companies including its strategic partners that could preclude the small business opportunities that Congress sought to promote in the Communications Act. Thus, the harm suffered by MCHI, if the Report and Order is not stayed, will be immediate and irreparable.

III. Stay of the Commission's Action Will Not Harm Other Applicants

Stay of the Commission's action pending judicial review will not harm any other applicants. The stay will merely preserve the status quo pending court review. All applicants will benefit from the added certainty that will be provided by reconsideration and clarification of the auction rules.

Several factors assure that no harm will be caused to the other applicants by the partial stay requested herein.

First, the stay has been carefully tailored to address only the ownership and financial qualifications issues which are most problematic.

Technical amendments would be submitted as scheduled on November 16, 1994. Staying only that portion of the Report and Order requiring submission of ownership and financial information until the Commission considers small business auction design features would allow the Commission's staff to evaluate the technical merits of each application and to confirm whether, in fact, an auction will be required. As noted above, AMSC has been invited to submit an entirely new technical proposal that has not previously been scrutinized by any party and other parties will submit significant technical amendments. Following submission of those amendments, it will be possible to determine how many systems can be accommodated in the available spectrum and whether mutual exclusivity exists.

Second, four of the applicants endorsed a more relaxed financial standard in the September 9, 1994 Joint Proposal (Appendix A), evidencing a judgment that deferral of a financial showing would not be harmful.

Third, the applicants can proceed with construction, prior to final authorization, under Section 319(d) waivers. Three of the applicants have already received such waivers, and a fourth request is now pending. These waivers will ensure that construction is not delayed pending resolution of the critical issues raised here.

IV. Stay of the Commission's Action is in the Public Interest

As discussed in Part I above, promotion of small business opportunity is a national policy objective as well as an explicit statutory requirement in

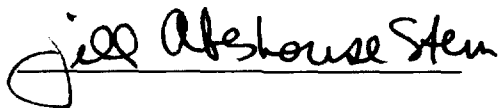
the auction statute. Congress and the Executive Branch have thus established the important public interest reasons for ensuring opportunities for small business.^{16/} Grant of the requested stay would therefore serve the public interest by ensuring consideration of small businesses, and ensuring diverse ownership and competition in the provision of communications services.

CONCLUSION

For the foregoing reasons, the Commission should stay that portion of its Report and Order requiring submission by November 16, 1994 of updated legal and financial information relating to the Big LEO applications, pending judicial review of the Commission's action, including the agency's failure to consider auction design measures to foster the participation of small businesses in the Big LEO service.

Respectfully submitted,

MOBILE COMMUNICATIONS
HOLDINGS, INC.

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Its Attorneys

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^{16/} See, e.g., H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. at 483, reprinted in 1993 U.S.C.C.A.N. at 710. See also H.R. Rep. No. 111, 103d Cong., 1st Sess. at 254, reprinted in 1993 U.S.C.C.A.N. at 581.

CERTIFICATE OF SERVICE

I, Norman J. Foy, hereby certify that the foregoing was served by first-class mail, postage prepaid, this 4th day of November 1994, on the following persons:

- * Chairman Reed E. Hundt
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, D.C. 20554
- * Commissioner James H. Quello
Federal Communications Commission
Room 802
1919 M Street, N.W.
Washington, D.C. 20554
- * Commissioner Andrew C. Barrett
Federal Communications Commission
Room 826
1919 M Street, N.W.
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- * Commissioner Rachelle B. Chong
Federal Communications Commission
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- * Commissioner Susan Ness
Federal Communications Commission
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- * Karen Brinkmann
Special Assistant
Office of the Chairman
Federal Communications Commission
Room 814
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- * Kathy Waldman
Chief, Common Carrier Bureau
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